

H2E3ACOS

Sentence

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

16 CR 296 (PAC)

5 KELVIN ACOSTA,

6 Defendant.

7 -----x

8 New York, N.Y.
9 February 14, 2016
3:00 p.m.

10 Before:

11 HON. PAUL A. CROTTY,

12 District Judge

13
14 APPEARANCES

15 PREET BHARARA

United States Attorney for the
Southern District of New York

16 MICHAEL D. NEFF

Assistant United States Attorney

17
18 FEDERAL DEFENDERS OF NEW YORK

Attorneys for Defendant

19 JENNIFER E. WILLIS

20 ALSO PRESENT: Special Agent Aaron Spivack, FBI

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1 THE DEPUTY CLERK: In the matter of docket number 16
2 CR 296, United States of America v. Kelvin Acosta. Government,
3 please state your appearance.

4 MR. NEFF: Good afternoon, your Honor. Michael Neff
5 for the government. I'm joined at counsel table by FBI Special
6 Agent Aaron Spivack and by Michael DeLuca, an intern in the
7 U.S. attorney's office.

8 MS. WILLIS: Good afternoon, your Honor. Jennifer
9 Willis, Federal Defenders of New York, on behalf of Mr. Acosta.

10 THE COURT: Ms. Willis. Mr. Acosta, how are you.

11 THE DEFENDANT: I'm doing good.

12 THE COURT: Has everybody seen the presentence report?

13 MR. NEFF: Yes, your Honor.

14 THE COURT: Any corrections you want to make,
15 Ms. Willis?

16 MS. WILLIS: No, your Honor.

17 THE COURT: I'm going to accept the facts as stated in
18 the presentence report as accurate. The guideline
19 calculations, according to the PSR, which is a variance from
20 what is in the plea agreement, is a offense level of 37 and a
21 criminal history category of II.

22 Do you agree with that, Ms. Willis?

23 MS. WILLIS: Your Honor, I do understand their
24 calculation and the rationale behind it. Obviously, Mr. Acosta
25 and I have signed a plea agreement agreeing to a stipulated

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1 guideline range, but I do understand and I don't have an
2 objection to the calculations as formulated by probation.

3 THE COURT: Mr. Neff?

4 MR. NEFF: The government does object, as noted in our
5 letter. We believe that the facts of this case and in
6 particular the video chats clearly meet or qualify for the
7 enhancement in the guidelines for a depiction of sadistic
8 conduct. I'm happy to address that further or I'm happy to
9 rely on the admittedly lengthy explanation in our letter for
10 why we believe the enhancement is not a close call.

11 THE COURT: You think that the offense level should be
12 set at 41?

13 MR. NEFF: That's correct, your Honor.

14 THE COURT: At offense level 41 and a criminal history
15 category of II, we're dealing with a sentence of 360 to life,
16 but because there is a statutory maximum here, it is 360.

17 MR. NEFF: That's exactly right.

18 THE COURT: I'm going to find the offense level is
19 properly set at 41, criminal history category is II, resulting
20 in the guideline sentence as contemplated by the plea agreement
21 of 360 months.

22 Ms. Willis, do you want to elaborate on your
23 submission?

24 MS. WILLIS: Your Honor, I do. I obviously don't want
25 to belabor the points I've already made and your Honor has

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1 already reviewed, but I do think it is important, when we're
2 dealing with a contemplated sentence of the length we're
3 talking about, to focus on what is the purpose of punishment.

4 And the statutory minimum here, which is 15 years, is
5 a very weighty and significant sentence. It is a sentence that
6 is sufficient, sufficient to accomplish the purposes of
7 sentencing. 15 years is an amount which certainly sends a
8 signal to society that courts take this sort of conduct
9 extremely seriously. It is also a sentence that is more than
10 sufficient for general deterrence, and in particular for
11 sufficient deterrence for Mr. Acosta.

12 Yes, he is someone who has a prior misdemeanor
13 conviction. And it's obvious by the fact that he sits here
14 that that misdemeanor conviction and the probation certainly
15 wasn't sufficient to deter him. But he has never had a period
16 of incarceration before. So, there is no basis to say that 15
17 years, which is a very significant sentence, would be not be
18 enough to deter him, I think there is no evidence of that.

19 And Mr. Acosta -- and it also, before I move on, a
20 significant reason for punishment, in addition to the specific
21 deterrence, that includes rehabilitation for the offender. And
22 here, Mr. Acosta is someone who -- so it is important to look
23 at not only his conduct, but who he is as a person, the
24 positive aspects of that, but also the things about his history
25 and his character that led to this offense. Because clearly

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1 what must be of paramount importance to the Court and to
2 society is to assure that nothing like this happens again.

3 And so, just sending him to prison doesn't really get
4 to the root of what led to him sitting before your Honor. And
5 what I attempted to do with the submission, in particular with
6 the evaluation from the doctor, as well as the memo from the
7 head of the social work department from my office, is to give
8 some context to what things in Mr. Acosta's life led to these,
9 quite frankly, deplorable choices that he made.

10 And he had begun, and I think this is crucial as well,
11 the process of changing himself, of attempting to rehabilitate
12 himself. When he was given the probation on the misdemeanor
13 matter, he did have an opportunity for sex offender probation.
14 But a key aspect, which I think Ms. Veasley, my social worker,
15 discussed in her memorandum, was a component of computer
16 addiction.

17 And I should point out Mr. Acosta's parents are in
18 court here today, and his mother, Reyes Acosta, wrote in her
19 letter about the fact that there were times where she would go
20 to work in the morning and Mr. Acosta was on the computer. She
21 would come home at the end of a full day of work, and he was
22 still on the computer. She talked about the fact that he would
23 stay in his room on the computer all the time and didn't want
24 to speak to people and didn't want to do anything else. And in
25 the memo from Ms. Veasley and the report from Dr. Termine, it

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1 also speaks about that, and Mr. Acosta himself expressed to
2 both of them that at the time, all he wanted to do was the
3 computer, that he had entered this sort of virtual world and
4 was disconnected from reality.

5 So by his computer and his internet access being cut
6 off at the time of his presentment, that was one of the
7 conditions of his release when he was out subsequent to the
8 presentment, prior to his plea before your Honor, his computer
9 was taken. His phone was taken, his cell phone that had
10 internet capabilities, and there were restrictions put in place
11 on his ability to access the internet, even through someone
12 else's devices, and he scrupulously adhered to that. And that
13 was a key piece in allowing him to engage meaningfully in
14 treatment. He demonstrated just in those four or five months
15 that he was capable of engaging in treatment.

16 That's really the question here. Is he someone who
17 can be rehabilitated. Is he someone who can be deterred, can
18 learn from this experience. There is nothing that he can do to
19 change the choices that he has made. But, what will happen
20 going forward and how much of a punishment is necessary to
21 ensure that he makes those changes.

22 Prior to being sentenced, prior to knowing what the
23 end result would be on this case, he committed himself to
24 making improvements, to changing his mindset, in attempting to
25 engage with people in a way that would allow him to make

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1 progress, and I think that that's really a crucial element
2 here. Even in those few months he demonstrated that.

3 The letter from his sister, who was not able to be
4 here today, you see from her letter that she and the entire
5 family support him. But her letter and his mother's letter
6 talk about the change that they saw just in those few months in
7 him. In his engagement with family, being willing to talk more
8 and be more open.

9 And his treatment that he had been doing at Mustard
10 Seed, the last progress note that they wrote talked about the
11 fact that, of late, he was more engaged in that treatment, that
12 he was participating more, even in the group therapy setting,
13 that he was engaging in that process more as well. And that
14 demonstrates that he is capable of that.

15 And a sentence in line with the guidelines, which
16 would be the top of the statutory range, would essentially be
17 saying that, one, that he cannot be rehabilitated, that he
18 cannot be redeemed, and that he has nothing more of value to
19 offer society.

20 And while, obviously, he needs to be punished, and I
21 in no way here or in my submission intended to say anything
22 that would sound as if we were minimizing the seriousness of
23 this conduct --

24 THE COURT: You can't minimize the conduct. I must
25 sentence him to at least 15 years.

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1 MS. WILLIS: Right. Exactly, your Honor, and I think
2 that --

3 THE COURT: Your position is that's enough.

4 MS. WILLIS: Yes. Very much so.

5 THE COURT: Where in your papers do you or Mr. Acosta
6 express remorse for what Mr. Acosta did?

7 MS. WILLIS: Your Honor, I believe that it's all
8 throughout the submission. He spoke --

9 THE COURT: It doesn't pop out at me.

10 MS. WILLIS: If it does not, your Honor, then that is
11 my error. I know he spoke to Dr. Termine, I know he spoke to
12 Rachelle Veasley, the social worker in my office, about knowing
13 this is wrong, appreciating the harm that he caused his
14 victims.

15 I think in particular, I highlighted that quote in my
16 portion of the submission understanding that given their age,
17 how clearly they wouldn't have been mentally ready for this
18 sort of conduct, expressing concern that they could have sort
19 of lifelong trust issues because of what he had done, and to
20 the extent that there is not a direct, you know, "I'm sorry for
21 what I've done" quote in here, then that is my error.

22 In my conversations with Mr. Acosta, during the period
23 of time in which he was at liberty and not in custody, during
24 the time in which he has been in custody at the Metropolitan
25 Detention Center, he certainly has expressed remorse. And if

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1 that was not adequately expressed in what I wrote, then that is
2 an oversight that I take responsibility for. I don't believe
3 that at all reflects on Mr. Acosta's feelings.

4 I think that a lot of the thrust of the work that we
5 were attempting to do as a team within the office was focused
6 on what -- getting to the root cause or at least trying to
7 grapple with what might be the root cause of this behavior.
8 And sort of focusing on that, and what would need to happen for
9 him to be rehabilitated. And that may be why the tenor of the
10 submission, if it appeared to you it was not only accepting
11 responsibility but also remorseful, would have been because of
12 that, because the thrust of what I was attempting to do was to
13 sort of get at the root cause, and then sort of project what
14 punishment and what other factors would need to happen for him
15 to be rehabilitated.

16 But, certainly, he's expressed to me his remorse. We
17 had spoken even prior to your Honor coming out about his
18 intention to address the Court, and that was a piece of what he
19 intended to say at the latter portion of these proceedings, was
20 that he is in fact sorry, and is committed, as I think I did
21 express in my submission, to correcting the things in his life
22 and in his mind that allowed this sort of behavior to go on.

23 THE COURT: Thank you.

24 Mr. Neff.

25 MR. NEFF: When the Court determines the sentence in

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1 this extremely troubling case, I hope that the Court keeps
2 forward in mind predatory, quantity, recidivist and harm.

3 First, predatory. This is not a typical case
4 involving the production of child pornography, which is bad
5 enough in its own right. This is far worse. The defendant
6 tricked minors, he lied to minors, hacked their accounts, and
7 he used his leverage. He threatened them, he terrified them,
8 and he coerced them to commit unwanted sex acts under threat of
9 public humiliation. He said he'd expose them, their families,
10 their friends, their schools.

11 The conduct, his conduct, was abhorrent.

12 Second, quantity. Your Honor, this was not a one-time
13 lapse in judgment. This was a sustained campaign of preying on
14 children on a daily basis, for years. And at a minimum for the
15 two years from December 2013 through November 2015, the
16 defendant tried to hack and extort minors. He admitted he
17 tried 15 to 20 times every day to hack and extort minors. In
18 total, he coerced 10 to 20 minors to produce child pornography
19 for him.

20 Third, recidivist. As the Court is aware, in 2014 the
21 defendant was convicted of exactly the same extortionate
22 misconduct. Except in that case, it happened to be a
23 19-year-old victim instead of 13-, 14-, or 17-year-old victims,
24 as in this case. In that case, the 2014 case, by hacking her
25 e-mail account, he got his hands on a sex video and he said he

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1 wouldn't delete it until she gave him oral sex. He was
2 arrested as they were meeting in person.

3 In 2014, the defendant expressed alleged remorse, and
4 he got what every convicted defendant hopes for, a second
5 chance. No jail. What did he do with it? He kept preying on
6 our youth every day while on probation. He didn't stop, he
7 didn't even slow down. The only change he made was to try to
8 make it harder to catch him. He stopped meeting with them in
9 person.

10 The defense can make the argument, as it does, that he
11 is a low risk to recidivate, but the evidence tells precisely
12 the opposite story. Since December 2014, he was on probation.
13 He's been in therapy. He didn't stop until he was caught
14 again. And the chats show on various occasions, victims beg
15 him to stop. Victims cry. Nothing stopped him. Even when he
16 was arrested federally in this case, he said he'd just resume
17 his misconduct when he got out of prison. He said he'd just
18 meet better hackers in jail. And as the Court noted, he does
19 not truly express remorse.

20 Fourth, and finally, harm. Judge, in the lead-up to
21 trial, before the defendant pled guilty, I had the opportunity
22 to meet with multiple victims for a number of hours. Their
23 courage was remarkable. So was the damage that he had done.
24 They were sobbing when describing what he made them do, how he
25 made them do it, what objects were involved, how they felt. He

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1 mocked them. He laughed at them. He yelled at them. They did
2 not have a choice. He violated them, their bodies, their
3 dignity, their mind, their health.

4 I'm quite mindful that the guidelines range here is
5 extremely high, but this defendant earned it.

6 The defense talked about his history, his character.
7 I'd respectfully submit his history is one of preying on
8 children repeatedly. And his character is one of putting his
9 basest desires before the health and dignity of our kids.

10 To sum up, through his predatory misconduct over and
11 over again, through his recidivism, through his lack of
12 remorse, he deserves the weighty sentence the guidelines call
13 for, and our kids and our community deserve to be protected
14 from him.

15 THE COURT: Mr. Acosta, this is your opportunity to
16 speak. Stay seated if you're more comfortable.

17 THE DEFENDANT: Sorry. I would like to say that I'm
18 so sorry what I did to all the girls that I did. I learned my
19 lesson. I know that they suffered, I know what I did was
20 wrong, and they deserve not one thing I did to them. And I
21 learned that now when I got off the computer, I learned that
22 they deserve respect and they deserve to be treated as women
23 and not as objects. And I'm truly apologizing, and I hope one
24 day they could forgive me, because now I know what I did was
25 truly wrong.

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1 THE COURT: Anybody else want to be heard?

2 MS. WILLIS: In response to the question you asked
3 about places in the submission where remorse was mentioned, on
4 page seven of Exhibit D, which was the report from Dr. Termine,
5 there is an extensive quote from Mr. Acosta prompted by her
6 asking about what negative impact his behavior could have had
7 on girls. The bit I referenced before is they might have trust
8 issues because of this, and he goes on to say "Before this, I
9 didn't care. I just wanted to get satisfaction and attention.
10 Me, me, me. I didn't put myself in their shoes or think if
11 that was my sister." And out of quote, Mr. Acosta now feels
12 sorry and remorseful. He stated "I was being selfish, taking
13 out my anger. I can only tell them how sorry I am and selfish
14 and what they're going through for the rest of their lives.
15 They didn't deserve it. If I think about it, it makes me so
16 depressed, so I don't. I can't change the past, so I need to
17 move forward and make the future better."

18 THE COURT: Okay. I've gone back and I read the
19 criminal complaint filed that led to Mr. Acosta's arrest. I
20 read the indictment. I've read the plea agreement and the
21 colloquy in which we took Mr. Acosta's plea back in
22 September 26. I read Ms. Willis's submission of February 4,
23 government's submission of February 9, and the presentence
24 report dated February 6, 2017.

25 I know there's many other judges who have sat on the

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1 bench longer than I have, but I've' been here for 11 and a half
2 years, almost 12 years, and have never seen a crime committed
3 that was so deplorable. It does so much damage. We have to
4 wait until page seven of the retained psychology report to get
5 any kind of intimation of regret.

6 The acts that Mr. Acosta committed are, in the words
7 of the presentence report, heinous, cruel, brutal, and
8 degrading. And he did it repeatedly, causing pain to children
9 and for his own personal pleasure.

10 This is the most deplorable, deprived act that I can
11 imagine, and the children that he was abusing would often say
12 "please stop." They'd cry. He was completely indifferent. He
13 cruelly ignored their requests, and insisted on his own sexual
14 gratification at the expense of others, and he did it, as I
15 say, over and over again, over a long period of time, even as
16 he had been caught.

17 What they were thinking of in the Bronx with the
18 19-year-old imposing a sentence as light as they did shows you
19 that sometimes sentences that are too lenient really encourage
20 people to commit further crimes, as Mr. Acosta did, because he
21 wasn't deterred a single bit.

22 On the other hand, these sentences are unusually long.
23 15 years as called for by the Federal Defenders, the mandatory
24 minimum, is too short.

25 I'm going to impose a sentence of 300 months and a

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1 term of supervised release of 10 years.

2 Do you have an order of restitution or forfeiture,
3 Mr. Neff?

4 MR. NEFF: We don't at this time, your Honor. We
5 would ask for the Court's permission to submit one within 90
6 days.

7 THE COURT: Right. I impose the special assessment of
8 \$100.

9 This is subject to the mandatory conditions of
10 supervised release, including registration in the sex registry
11 system. And the registration has to take place where the
12 defendant resides, where he's employed, where he carries on his
13 vocation or as a student, and he shall provide proof of
14 registration to his probation officer.

15 The standard conditions one through 13 are imposed,
16 and the following additional special conditions are imposed:
17 Mr. Acosta is to participate in vocational and educational
18 courses to better prepare him for future employment
19 opportunities. He is to participate in outpatient treatment
20 program approved by the probation office, which program will
21 include testing to determine whether he's reverted to using
22 drugs or alcohol. He shall contribute the costs of services
23 rendered based on the defendant's ability to pay and the
24 availability of third-party payments. I authorize the release
25 of available drug treatment evaluations and reports, including

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1 the presentence investigation report.

2 Mr. Acosta shall undergo a sex offense specific
3 evaluation and participate in an outpatient sex offender
4 treatment and/or outpatient mental health treatment approved by
5 the U.S. probation office. He shall abide by all the rules,
6 requirements and conditions of the sex offender treatment
7 program, including submission to polygraph testing. Mr. Acosta
8 is to waive his right of confidentiality and any records for
9 mental health assessment and treatment imposed as a consequence
10 of this judgment, to allow the probation officer to review
11 defendant's course of treatment and progress with the treatment
12 provider. Mr. Acosta shall pay for the cost of services
13 rendered based on his ability to pay or the availability of
14 third-party payments. I authorize the release of the reports.

15 Mr. Acosta shall not have any contact with the victims
16 in this case. This includes any physical, visual, written or
17 telephone contact with such persons. Additionally, Mr. Acosta
18 shall not directly cause or encourage anyone else to have such
19 contact with the victims.

20 Mr. Acosta shall not have any deliberate contact with
21 any child under 18 years of age unless approved the probation
22 department. He's not to the loiter within a hundred feet of
23 schoolyards, playgrounds, arcades, or other places primarily
24 used by children under the age of 18.

25 Mr. Acosta is to submit his person, residence, place

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1 of business, vehicle, and any other property and computers,
2 electronic communication and data storage devices and other
3 media under his control to a search, on the basis that the
4 probation officer has reasonable suspicion that contraband or
5 evidence of a violation of the conditions of the defendant's
6 probation or supervised release may be found. The search has
7 to be conducted at a reasonable time and in a reasonable
8 manner. Failure to submit to a search may be grounds for
9 revocation. Mr. Acosta is to be supervised in the district of
10 his residence.

11 I must impose the special assessment of \$100 and I do
12 so.

13 That's the sentence I intend to impose. Ms. Willis,
14 do you have any objections, other than the ones you've already
15 voiced?

16 MS. WILLIS: No, your Honor.

17 THE COURT: Do you want me to make a recommendation as
18 to place of incarceration?

19 MS. WILLIS: Yes, your Honor. I would request that
20 Mr. Acosta be recommended to serve his sentence in close
21 proximity to New York City so as to facilitate his family being
22 able to visit.

23 THE COURT: I will make that recommendation.

24 MS. WILLIS: Thank you.

25 THE COURT: Mr. Acosta, now that I've imposed

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1 sentence, I have to advise you that you have the right to
2 appeal the sentence. If you can't afford to pay the cost for
3 appeal, you can apply for permission to appeal in forma
4 pauperis. If you so request, my clerk will immediately prepare
5 and file a notice of appeal on your behalf. The notice of
6 appeal has to be filed within 14 days of the entry of judgment.
7 Judgment will be entered by noontime tomorrow.

8 I note in your plea agreement of September 22, 2016,
9 you agreed to waive your appeal rights to any sentence that was
10 at or below the guideline range of 360 months. Your sentence
11 is below the guideline range. Ms. Willis can advise you
12 further on whether or not you have a right of appeal, and if
13 so, on what grounds.

14 Any open counts, Mr. Neff?

15 MR. NEFF: Yes, your Honor. The government moves to
16 dismiss all open counts, which in this case are Counts Two
17 through Seven of the indictment.

18 THE COURT: Counts Two through Seven are dismissed.

19 MR. NEFF: Just to note for the record, in the plea
20 agreement the defendant agreed to forfeit property used to
21 facilitate his crimes, such as his laptop computer.

22 THE COURT: That's why I asked you if you had an order
23 of forfeiture.

24 MR. NEFF: That property is already in the FBI
25 custody, and the government does not seek forfeiture beyond

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1 that.

2 THE COURT: Restitution?

3 MR. NEFF: We intend to submit an order of restitution
4 to the Court within --

5 THE COURT: Within 90 days.

6 MR. NEFF: Exactly.

7 THE COURT: Okay. Anything else, Ms. Willis?

8 MS. WILLIS: No, your Honor.

9 THE COURT: Thank you very much.

10 MR. NEFF: Thank you.

11 o0o